Alboum v. Koe, M.D., et al., Discovery Commissioner Opinion #10 (November, 2001)

1. COMPLIANCE WITH E.D.C.R. 2.34
2. ASSERTION OF PRIVILEGE

A. Background

This is a medical negligence case. Plaintiff, Ruth Alboum, fell in Las Vegas on or about January 2, 1998, sustaining complex fractures to her left shoulder. She was taken to Defendant, Desert Springs, Hospital, where she eventually was operated upon by Defendant, Koe, on January 4, 1998. He performed a hemiarthroplasty. Some issues in the case involve the qualifications of Dr. Koe to perform the surgery and whether Plaintiffs were given incorrect information concerning his experience/qualifications. Plaintiffs allege Defendant, Desert Springs, did not properly select, monitor, supervise and review the treatment administered by Dr. Koe, thereby failing in its duty to provide quality care to a patient. As a result of this alleged negligence by Defendants, Plaintiff, Ruth Alboum, was permanently damaged.

The dispute presently before the Commissioner arises out of Plaintiffs' motion to compel the production of certain records from Defendant hospital. Plaintiffs' counsel attached to the motion Plaintiffs' requests and the responses by Defendant. Plaintiffs argue the documents had also been

requested approximately one year before at the 16.1 conference, as well as by the formal requests at issue which were generated four months prior to the motion. Discovery had been scheduled to close two weeks before the motion was heard. The nature of the motion raises two issues for resolution. The first issue concerns compliance with Eighth Judicial District Court Rule 2.34 and the second deals with the proper manner in which to assert a privilege objection.

I.

DISCOVERY MOTION PROCEDURE

N.R.C.P. 37 permits a discovering party to move for an order to compel an appropriate response to a properly submitted interrogatory, request for production or other discovery inquiry. Prior to making such a motion, however, Eighth Judicial District Court Rules require the parties to engage in a good faith effort to resolve the discovery dispute on an informal basis. The Nevada Rules of Civil Procedure expressly recognize the authority of each local district court to issue rules governing its own practice not inconsistent with these statewide rules. N.R.C.P. 83; Nevada Power Co. v. Fluor Ill., 108 Nev. 638, 837 P.2d 1354 (1992).

Local Eighth Judicial District Court Rule 2.34 provides in part as follows:

> (d) Discovery motions may not be filed unless an affidavit of moving counsel is attached thereto setting forth that after a discovery dispute conference or a good faith effort to confer, counsel have been unable to

> resolve the matter satisfactorily. A conference requires either a personal or telephone conference between or among counsel. Moving counsel must set forth in the affidavit what attempts to resolve the discovery dispute were made, what was resolved and what was not resolved, and the reasons therefor. If a personal or telephone conference was not possible, the affidavit shall set forth the reasons.
>
> If the responding counsel fails to answer the discovery, the affidavit shall set forth what good faith attempts were made to obtain compliance. If, after request, responding counsel fails to participate in good faith in the conference or to answer the discovery, the court may require such counsel to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure. When a party is not represented by counsel, the party shall comply with this rule.

In attempted compliance with the Rule's "meet-and-confer" requirements, Plaintiffs' counsel submitted an affidavit which stated in pertinent part as follows:

> The documents requested of DESERT SPRINGS HOSPITAL, as set forth in the Plaintiffs' Motion herein, were not produced.
>
> Affiant has talked with counsel for DESERT SPRINGS HOSPITAL regarding the production and was informed that the only way the Hospital will produce the requested items is through a Motion to Compel. [affidavit of James Marshall attached as page 5 of Plaintiffs' motion]

Movant then filed the instant motion; but notice the almost complete lack of compliance by the affidavit with the requirements of the Rule. It is true that usually time is needed to insure compliance, but the fact that the discovery relief at issue was sought late in the case is no excuse for failure to comply. Unfortunately, dilatory discovery has too often become the norm in the Eighth Judicial District, and

this must stop. For either the Discovery Commissioner or the Judge to look at such a predicament, sigh, and then go ahead and rule, simply encourages the dilatory and/or indifferent attorney to continue the bad habit. The court has no time to do the work that is counsels' responsibility.

. . .

No Nevada Supreme Court decision has addressed E.D.C.R. 2.34. However, there is abundant federal case authority explaining similar "meet-and-confer" rules. Such counterpart authority is often persuasive though not controlling, when interpreting Nevada Civil procedure rules. See, e.g., Bowyer v. Taack, 107 Nev. 625, 817 P.2d 1176 (1991); Dougan v. Gustaveson, 108 Nev. 517, 835 P.2d 795 (1992). Other state authority interpreting similar rules may also be taken into account.

It is clear that civil discovery should be essentially self-executing. Zellerino v. Brown, 1 Cal. Rptr.2d 222 (Cal. App. 1991). The underlying purpose of "meet-and-confer" is simple: to encourage the parties to work out their differences informally so as to avoid the necessity for a motion and formal court order, when the parties could confer and reach a mutually acceptable solution to the problem. Hunter v. Moran, 128 F.R.D. 115 (D.Nev. 1989). This will lessen the burden on the court and reduce unnecessary expenses for the litigants by promotion of informal, extra-judicial resolution of discovery

disputes. Nevada Power Co. vs. Monsanto Co., 151 F.R.D. 118 (D.Nev. 1993). Halas v. Consumer Services, Inc., 16 F.3d 161 (7th Cir. 1994); First Savings Bank, F.S.B. v. First Bank Sys., 902 F. Supp. 1356 (D. Kan. 1995). In this manner the Local Rule also furthers the mandate of N.R.C.P. 1 to secure the just, speedy and inexpensive determination of every action. Shuffle Master v. Progressive Games, 170 F.R.D. 166 (D.Nev. 1996).

. . .

To that end the "meet-and-confer" rule requires the parties to make a good faith effort to resolve the dispute, without regard to technical interpretation of the language of the particular discovery request, determine what the requesting party is actually seeking and what specific genuine issues, if any, cannot be resolved prior to seeking judicial intervention. Tri-Star Pictures v. Unger, 171 F.R.D. 94 (S.D.N.Y. 1997). During the informal negotiations, the parties must present to each other the merits of their respective positions with the same candor, specificity and support, as they do when presenting their position to the Commissioner. "Only after all the cards have been laid on the table, and a party has meaningfully assessed the relative strengths and weaknesses of its position in light of all available information, can there be a 'sincere effort' to resolve the matter." Nevada Power Co. vs. Monsanto Co., supra, at 120;

Prescient Partners, L.P. v. Fieldcrest Cannon, 1998 U.S. Dist. Lexis 1826 (S.D.N.Y. 1998).

In the instant case there was no discussion of the merits of respective positions, nor any sincere effort to analyze the strengths and weaknesses of each party's position. There was only a demand for production and a refusal to produce without a motion to compel. Only after the motion to compel did the Defendant even set forth arguments in support of its refusal to produce. The personal consultation required of the parties is supposed to be a substitute for and not merely a formalistic prerequisite to judicial resolution. Shuffle Master v. Progressive Gaming, supra; Nevada Power v. Monsanto, supra.

It is unfortunate, then, that the "meet-and-confer" conference has in many instances evolved into a pro forma matter, as demonstrated in the pending motion. Even when the moving party has already set a formal motion for hearing, relying on the cursory recitation that counsel "have been unable to resolve the matter after personal consultation and sincere effort to do so," there are still many instances when counsel arrive at the hearing only to announce they have resolved the dispute. Subsequent to the filing of the instant motion, efforts to resolve the dispute at bar involved the production of an "index" of records by Defendant, who claimed privilege as to most documents in a general manner,

but agreed that some could be produced. Obviously this attempt at narrowing the issues was never discussed at a "meet-and-confer" and, in any event, was too little to late. Except under the most unusual of circumstances, no good faith 2.34 compliance can occur after the motion is made and the hearing set.

Other insufficient efforts to comply with "meet-and-confer" requirements include sending a letter demanding compliance, then filing your motion. See, e.g., Ballou v. University of Kansas Med. Center, 159 F.R.D. 558 (D. Kan. 1994); Soto v. City of Concord, 162 F.R.D. 603 (N.D. Cal. 1995); Hunter v. Moran, supra. A remark at a deposition about overdue responses or some bickering about the failure to answer a question do not constitute a proper "meet-and-confer." Dewitt v. Penn-Del Directory Corp., 912 F.Supp. 707 (D. Del. 1996); Townsend v. Superior Ct., 72 Cal. Rptr. 2d 333 (Cal. App. 1998). Nor does leaving a vague message about discovery responses with opposing counsel on Friday afternoon comply with the rule. Alexander v. FBI, 186 F.R.D. 197 (D. D.C. 1999).

In order to satisfy the requirements of E.D.C.R. 2.34 the movant must detail in an affidavit the essential facts sufficiently to enable the Commissioner to pass preliminary judgment on the adequacy and sincerity of the good faith discussion between the parties. It must include the name of

the parties who conferred or attempted to confer, [the conference should be between the attorneys/parties – not delegated to secretaries or paralegals] the manner in which they communicated, the dispute at issue, as well as the dates, times and results of the discussions, if any, and why negotiations proved fruitless. Shuffle Master v. Progressive Gaming, supra; Hunter v. Moran, supra; Messier v. Southbury Training School, 1998 U.S. Dist. Lexis 20315 (D. Conn. 1998). None of the required work was done prior to the filing of the instant motion.

The above steps in the conferment process must not only be done, but also be done in good faith; i.e., did the parties discuss the propriety of the asserted objections? Did they determine precisely what the requesting party was seeking and what information the responding party should reasonably supply? Did they converse, compare views and deliberate as to a solution? Contracom Commodity Trading Co. v. Seaboard Corp., 189 F.R.D. 456 (D.Kan. 1999); Deckon v. Chidebere, 1994 U.S. Dist. Lexis 12778 (S.D.N.Y. 1994).

Good faith is tested, not just by the quantity of contacts, but the quality as well; further, it is adjudged according to the nature of the dispute and the reasonableness of the positions held by the respective parties, as well as any suggested compromise of those positions. The keys are honesty in one's purpose to meaningfully discuss the discovery

dispute, freedom from intention to defraud or abuse the discovery process and faithfulness to one's obligation to secure information without court action. Contracom Commodity Trading Co. v. Seaboard Corp., supra; Prescient Partners, L.P. v. Fieldcrest Cannon, supra. If counsel have any doubts as to the quantity and quality of the "meet-and-confer" requirements, I strongly suggest a reading of the Shufflemaster v. Progressive Gaming case, cited throughout this opinion, as to what counsel must do prior to filing a further discovery motion.

This court shall continue to be strict in the enforcement of the discovery rules in general and specifically the "meet-and-confer" rule of the Eighth Judicial District Court. I intend to follow the lead of the Nevada Supreme Court to impress upon the members of the bar the resolve to end lackadaisical practices and enforce the rules of civil procedure. See, e.g., Moran v. Bonneville Square Assoc., 117 Nev. Adv. Op. 46, 25 P.3d 898 (2001); KDI Sylvan Pools v. Workman, 107 Nev. 340, 810 P.2d 1217 (1991). The purpose is to prevent the needless expenditure of the limited resources of the court. Litigants must adhere to the "meet-and-confer" requirements; violations will not be condoned simply because the potential for compromise appears bleak. Tri-Star Pictures v. Unger, supra; Hasbro, Inc. v. Serafino, 168 F.R.D. 99 (D. Mass. 1996).

Failure to comply will often mean a denial of the discovery motion under ordinary circumstances. see, e.g., Schick v. Fragin, 1997 Bankr. Lexis 1250 (Bankr. S.D.N.Y. 1997); Tri-Star Pictures v. Unger, supra. The court does have the discretion to consider a non-conforming motion on its merits. It will do so if the time for filing another motion has passed, compromise is unlikely, the responding party has opposed on the merits and movant would be unduly prejudiced by not receiving a ruling on the merits. Pulsecard, Inc. v. Discover Card Services, Inc., 168 F.R.D. 295 (D.Kan. 1996); Prescient Partners, L.P. v. Fieldcrest Cannon, Inc., supra; Reidy v. Runyon, 169 F.R.D. 486 (E.D.N.Y. 1997). However, it is more likely the motion would be stricken, Dewitt v. Penn-Del Directory Corp., supra; Townsend v. Superior Ct., supra; sanctions would be imposed, Alexander v. FBI, supra; or the parties sent back for a meaningful meet-and-confer. Doe v. National Hemophilia Foundation, 194 F.R.D. 516 (D. Md. 2000); Nevada Power v. Monsanto, supra.

II.

ASSERTION OF PRIVILEGE

A more specific "meet-and-confer" requirement is invoked, when dealing with assertions of privilege. As noted above, the instant motion arises out of Plaintiffs' request for production of documents, including certain records for which privilege was claimed by the Defendant hospital. A

typical request and response was as follows:

> **REQUEST NO. 2**
>
> Please produce copies of all documents verifying Defendant Ronald C. Koe's credentials as an orthopaedic surgeon, including school documents evidencing satisfactory completion of all schooling necessary to qualify as a staff orthopaedic surgeon.
>
> **RESPONSE TO REQUEST NO. 2**
>
> These documents are objected to as privileged pursuant to the peer review privilege and patient confidentiality privilege. Without waiving said objections, the documents will be available for an in-camera review, with index, by the Discovery Commissioner, upon motion by Plaintiffs.

The assertion of privilege here was totally inadequate.

Parties may not obtain discovery of privileged information, where the privilege has been properly protected and not waived. See N.R.C.P. 26 (b)(1); Tidvall v. Eighth Judicial Dist. Ct. ex rel. County of Clark, 91 Nev. 520, 539 P.2d 456 (1975). However, privileges are narrowly construed. DR Partners v. Bd. of County Comm's., 116 Nev.Adv.Op. 72, 6 P.3d 465 (2000). Ashokan v. State Dept. of Ins., 109 Nev. 662, 856 P.2d 244 (1993). The burden of establishing that a privilege exists is on the party claiming the privilege. See e.g., 6 Moore's Federal Practice, § 26.47[1] (3d ed. 1997); Roesberg v. Johns-Manville Corp., 85 F.R.D. 292 (E.D.Pa. 1980); Peat, Marwick, Mitchell & Co. v. West, 748 F.2d 540 (10th Cir. 1984). That burden cannot be discharged by mere conclusory assertions, for any such rule would foreclose meaningful inquiry into the existence of the privilege and any spurious claims could never be exposed. Von Bulow v. Von

Bulow, 811 F.2d 136 (2d.Cir. 1987). Generalized, non-specific claims of privilege may waive any otherwise applicable privilege. See, e.g., Ritacca v. Abbott Labs, 49 Fed.R.Serv.3d 1052 (N.D.Ill. 2001).

Usually when I find no explanation as to why a privilege is claimed, it is because counsel is unsure of the reason. Sometimes counsel is too busy to explain or fails to research the law; sometimes counsel is just plain lazy. However, as clear in this case, most blanket privileges are asserted by counsel who have not carefully reviewed the pertinent documents. By forcing a party to justify its privilege objections as it asserts them, counsel will be required to review such documents carefully before withholding them. Nevada Power Co. v. Monsanto Co., supra.

In order to properly discharge the burden of establishing a privilege in the Eighth Judicial District, the first step by the objecting party, in sync with E.D.C.R. 2.34, is to produce an informative privilege log. This log should be served along with the privilege claims on the discovering party. In the instant case defense counsel compounded the problem of lack of 2.34 communication by refusing to provide a privilege log without a motion, even after making only general assertions of privilege. When defense counsel later reviewed the allegedly privileged documents in preparation to oppose the motion to compel, the claim was withdrawn as to some documents at that

point. The early preparation of such a log should remind objecting counsel that the assertion of blanket claims of privilege would be fruitless and that such general claims are inadequate in response to a discovery request. See, e.g., Diamond State Ins. Co. v. Rebel Oil Co., Inc., 157 F.R.D. 691 (D.Nev. 1994); Obiajulu v. City of Rochester, 166 F.R.D. 293 (W.D.N.Y. 1996). This procedure will aid the meaningful good faith communications required by E.D.C.R. 2.34, as well as conform to the general practice of the local federal district court. see, e.g. Nevada Power Co. v. Monsanto Co., supra.

The privilege log procedure is still not understood by some attorneys. It is not a method whereby certain documents are simply designated and submitted to the Discovery Commissioner for in camera review. On the contrary, the purpose is to prepare a log in such a fashion that the parties will be able to work out their difficulties without involving the court.

Although within the discretion of the court, in most instances in camera reviews are a disfavored technique. Diamond State Ins. Co. v. Rebel Oil Co., Inc., supra; Kluzinger v. IRS, 27 F.Supp. 2d 1015 (W.D. Mich. 1998); In re Grand Jury Subpoenas (Anderson), 906 F.2d 1485 (10th Cir. 1990). The U.S. Supreme Court has approved in camera reviews in some circumstances, but a review should not be conducted solely because a party urgently requests it. U.S. v. Zolin,

491 U.S. 554, 109 S.Ct. 2619, 105 L.Ed. 2d 469 (1989). Before determining whether an in camera review is proper, there must be a sufficient evidentiary showing which creates a legitimate issue as to the application of the privilege asserted. Nishika, Ltd. v. Fuji Photo Film Co., Ltd., 181 F.R.D. 465 (D. Nev. 1998). The court must have some bases or grounds for conducting an in camera review. Mounger v. Goodyear Tire & Rubber Co., 2000 U.S. Dist. Lexis 20505 (D. Kan. 2000).

The in camera review, particularly in a case involving a substantial volume of documents, should not be substituted for a party's submission of an adequate record in support of its privilege claims. The privilege log or "index" eventually submitted in the case at bar was inadequate, as it often failed to identify the author of the document, to whom the document was disseminated, the purpose of the document and, most importantly, a detailed, specific explanation as to why the document was privileged or otherwise immune from discovery. A party who chooses to invoke a privilege and/or work product immunity for a vast amount of material, yet declines to make the necessary specific factual showing in support thereof, would simply be shifting the burden to the court to sift through the documents
to see if there was support for the claims. This is unacceptable. Browne of New York City, Inc. v. AmBase Corp., 150 F.R.D. 465 (S.D.N.Y. 1995).

In requiring a party to provide a factual basis for its claims of privilege the court has significant discretion in how to proceed. I agree with those courts who feel the most meaningful way to accomplish this is through the production of a detailed privilege log. Nevada Power Co. v. Monsanto Co., supra. The requirements of a privilege log in the Eighth Judicial District Court shall be substantially as follows: For each document the log should provide 1) the author(s) and their capacities, 2) the recipients (including cc's) and their capacities, 3) other individuals with access to the document and their capacities, 4) the type of document, 5) the subject matter of the document, 6) the purpose(s) for the production of the document, 7) the date on the document, and 8) a detailed, specific explanation as to why the document is privileged or otherwise immune from discovery, including a presentation of all factual grounds and legal analyses in a non-conclusory fashion. Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973); Diamond State Ins. Co. v. Rebel Oil Co., Inc., supra; Nevada Power Co. v. Monsanto Co., supra. Such explanation may require affidavits or other evidence as a supplement to the log. Allendale Mut. Ins. Co. v. Bull Data Systems, Inc., 145 F.R.D. 84 (N.D. Ill. 1992).

C O N C L U S I O N

In conformance with 2.34, as set forth above, counsel should have been able to dissect the privilege claims at issue

in this motion as they discussed the relative strengths and weaknesses of the privilege claimed for each document. Nevada has some substantial authority right on point as to the privilege issues at stake. See Columbia/HCA Healthcare v. District Ct., 113 Nev. 521, 936 P.2d 844 (1997); Ashokan v. State, supra. If the parties would only have taken the time to confer in good faith and sincerely consider the applicable law, I am positive they could have reached a mutually acceptable solution without the necessity of a trip to court or at least the trip would have been short, involving a much more focused argument on some limited issues.

Given the findings above, I suggest the Plaintiffs' motion to compel is not ripe for decision. If, upon renewal of the instant motion, it is determined any counsel are not abiding by
2.34 or not proceeding appropriately on a privilege question, sanctions shall be recommended.

R E C O M M E N D A T I O N S

IT IS HEREBY RECOMMENDED Plaintiffs' Motion to Compel be denied at this time;

IT IS FURTHER RECOMMENDED that the parties conduct further 2.34 conferences regarding the issues raised in this motion and, as a part of the "meet-and-confer," Defendant shall supply to Plaintiff an adequate privilege log in conformance with this opinion; after the required conferences

between the parties if issues still remain, they shall be submitted by way of further motion.